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No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1960

BANTAM BOOKS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a)[1] is reported at 275 F. 2d 680. The opinion and order of the Federal Trade Commission (App. 8a-22a) have not yet been reported.

JURISDICTION

The decree of the court of appeals was entered on March 21, 1960 (Pet. App. 1a-12a). The petition for a writ of certiorari was filed on June 18, 1960. The jurisdiction of this court is invoked under 15 U.S.C. 45(c) and 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari, and "App." to the appendix filed by petitioner in the court below.

QUESTION PRESENTED

The Federal Trade Commission found that petitioner's failure adequately to disclose on the cover of certain of its republished paperbound books that they were either abridgments or old books with a new title violated Section 5 of the Federal Trade Commission Act by tending to induce purchases of such books in the mistaken belief that they were complete and unabridged or were new and original publications. The sole question presented is whether the Commission's order forbidding petitioner to sell its abridged or retitled books without disclosing the facts "in clear, conspicuous type" in a "position adapted readily to attract the attention of a prospective purchaser" is void for vagueness.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 717, as amended by 52 Stat. 111–113, 15 U.S.C. 45) are as follows:

> *Section 5(a)*: Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. * * *
>
> The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> *Section 5(b)*: * * * If upon * * * hearing the Commission shall be of the opinion that the * * * act or practice in question is prohibited by this Act, it shall * * * issue and cause to be served * * * an order requiring

such person, partnership, or corporation to cease and desist from using such * * * act or practice.

STATEMENT

Petitioner is a New York corporation engaged in the business of selling and distributing paper-bound books in substantial quantities in interstate commerce. Between 1945, when petitioner commenced doing business, and the institution of this proceeding, it published and distributed over 1,100 different titles representing more than 350,000,000 books. Some of the books sold and distributed were abridgments, *i.e.*, reprints of books in which portions of the original text had been shortened or omitted. Others contained the full text of the original publication but were republished under a new title.

After full hearing upon the Commission's complaint charging unfair and deceptive acts and practices in commerce, the examiner found that in a number of instances cover statements as to abridgment or change of title were of such size, location or color[2] that they had "the tendency and capacity to lead a portion of the purchasing public into the mistaken and erroneous belief that said books are complete and unabridged, or are new and original publications, and to induce a substantial portion of said public to purchase respondent's said books because of said erroneous and mistaken belief" (App. 19a–20a). An order was entered forbidding petitioner to sell its abridged or retitled books unless

[2] In one instance, there was no disclosure that the book was abridged (App. 12a, 19a).

clear notice of the abridgment or retitling is given on the cover and title page "in clear and conspicuous type", "either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser" (App. 20a–21a). The cease and desist order proposed by the examiner was adopted by the Commission (App. 21a–22a). The court of appeals affirmed (Pet. App. 1a).

ARGUMENT

The sole question raised by the petition is whether petitioner's rights have been violated because of the alleged vagueness of the Commission order requiring that adequate notice be given the public when petitioner publishes a reprint which is either abridged or retitled. Petitioner argues that the requirement that the notice be "in clear and conspicuous type" in a "position adapted readily to attract the attention of a prospective purchaser" is defective because it does not set forth a clear standard by which petitioner can determine whether a particular statement is sufficiently conspicuous. But, as the court below concluded (Pet. App. 6a), the argument that the broad discretion afforded petitioner to choose its own method of complying with the Commission's order deprives it of due process is "unfounded."[1]

[1] As the court below pointed out (Pet. App. 6a), there is also a serious question whether this issue was properly presented on appeal in view of the failure to raise the matter before the Commission on appeal from the examiner's opinion. See *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 34–38; *Hormel* v. *Helvering*, 312 U.S. 552, 556; *Helvering* v. *Tex.-Penn Oil Co.*, 300 U.S. 481, 498.

Petitioner points to testimony, accepted by the examiner, indicating that as many as eleven separate "factors" or "characteristics" may be involved in determining whether a particular legend is adequate to attract attention (Pet. 7–8). But the existence of such variables does not, as petitioner suggests, lead to the conclusion that fixed regulations governing the permissible limits are either necessary or practicable. As the court of appeals observed (Pet. App. 6a), "[i]t is by no means plain that more detailed specification by the Commission was feasible. What type is needed to give adequate notice of abridgement or retitling on a cover is not a constant but a variable, depending upon the color of the legend, its place, the size and color of the cover and other printed material, the presence or absence of illustrations, and other things." Indeed, in a previous decision involving the identical problem the court of appeals held that an order requiring a publisher to locate the identifying legend "in immediate connection with the title" was too restrictive and that "both the public interest and the legitimate interests of the publisher could be sufficiently protected by a more flexible requirement." *New American Library of World Literature, Inc.* v. *Federal Trade Commission*, 213 F. 2d 143, 145–146 (C.A. 2). Whether or not the court's insistence upon such latitude was necessary (see *Hillman Periodicals Inc.* v. *Federal Trade Commission*, 174 F. 2d 122 (C.A. 2)), there can be no doubt that the order adopted by the Commission in the instant case was well within its discretionary authority to

formulate the nature of remedial relief. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; see *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29, 31 (C.A. 7); *Consolidated Royal Chemical Corp.* v. *Federal Trade Commission*, 191 F. 2d 896, 900 (C.A. 7).

Contrary to petitioner's suggestion, "[w]e do not have here the problem of a penal statute that deserves strict construction." *Federal Trade Commission* v. *Mandel Brothers*, 359 U.S. 385, 389. Cease and desist orders do not impose criminal punishment for past acts; they proscribe illegal practices for the future. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. The fact that petitioner is subject to sanctions upon a showing of willful and knowing violation of the order does not mean that the Commission must attempt the impracticable task of spelling out in advance precise details as to the size or color of the type to be used or the other factors relevant to an adequate disclosure in particular cases. Cf. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188 (where a decree cannot as a practical matter be made more specific, its generality "is a burden which those who have violated the Act must carry"). Such constitutional rights as petitioner may have in protecting itself from sanctions in the face of a good-faith attempt to comply with the Commission order can be fully vindicated in subsequent enforcement actions.

The short of the matter is that petitioner has no legitimate interest in concealing from an unwary

buyer the fact that a book has been abridged or the fact that its title has been altered. The covers of paperback books are not always notable for the restraint with which they portray matter which the publisher may deem alluring to the prospective reader. Thus, one can scarcely credit the notion that the publisher will be at a loss in finding means which will adequately convey to the public information which the public is entitled to have. On the contrary, one may safely say that a publisher could have difficulty in complying with the Commission's direction in this case only if he should desire to skirt as closely as possible to the line. The courts do not sit to insure against such "a calculated risk," *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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